No. 49343-8-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CARLOS PEREZ CALDERON

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 15-1-02263-9

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

The appellant incorporates the statement of the case as set forth in his opening brief.

II. ARGUMENT

A. THE DEFENSE WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER IN THE FIRST AND SECOND DEGREE.

In determining that the trial court erred in failing to give the proposed instructions, the first step to reaching that conclusion is beginning with the requirement that the court is to view the evidence in the light most favorable to the defendant. *See State v. Fernandez-Medina,* 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The state contends that there was no affirmative evidence supporting a lesser included instruction. However, while the state strains to distinguish *State v. Hunter,* 152 Wn.App 30, 216 P.3d 421 (2009), the facts of that case are consistent with those presented here.

In *Hunter*, the court stated:

> Here, Hunter admitted shooting Sergeant but argued that the shooting was an accident. Therefore, this case can be distinguished from *Hernandez* in that Hunter can establish the elements of first and second degree manslaughter. Hunter's testimony that the shooting was an accident raised the inference that Hunter was guilty only of manslaughter and not murder. Without the lesser included offense instruction, Hunter could not adequately argue his theory of the case. Refusal to give the lesser included instructions allowed the jury to disregard Hunter's testimony that the shooting was an accident. Furthermore, without the instruction, the

> jury's only alternative to the second degree murder conviction was a not guilty verdict, a difficult or impossible verdict in light of Hunter's admission that he shot Sergeant in the face, which shot resulted in her death. VII RP at 510. Had the lesser included instructions been given, the jury could have reasonably inferred from all the evidence that Hunter did not intend to kill Sergeant. *Fernandez-Medina*, 141 Wash.2d at 456-57, 6 P.3d 1150. Therefore, the trial court abused its discretion in refusing to give the lesser included offense instructions.

152 Wn.App. at 47.

Importantly, as in *Hunter*, the state has acknowledged that "...there is evidence that affirmatively establishes accident..." State's brief at 10. As in *Hunter*, this alone establishes his right to the lesser included instructions on first and second degree manslaughter. *Id.*

To be sure, whether sufficient evidence has been presented to raise a claim made by the defense is to be based on all of the evidence from whatever source. *State v. Fisher,* 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). As stated in *Fisher*:

> Fisher was "entitled to have the jury instructed on [her] theory of the case if there [was] evidence to support that theory." *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Failure to do so is reversible error. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). In evaluating Fisher's evidence, the trial court must view it in the light most favorable to her. *State v. Fernandez-Medina*, 131 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *cf State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015) (lesser-included offense instruction needed where evidence viewed in light most favorable to defendant raised inference he committed lesser crime.) This evidence may come from "whatever source" that tends to show that the defendant is entitled to the instruction. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064

> (1983). Because the defendant is entitled to the benefit of all the evidence, *State v. Gogolin*, 45 Wn.App. 640, 643, 727 P.2d 683 (1986), her defense may be based on facts inconsistent with her own testimony. *State v. Callahan*, 87 Wn.App. 925, 933, 943 P.2d 676 (1997). "The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it]." *McCullum*, 98 Wn.2d at 488. In short, the defendant has the burden of production and, if met, the burden of persuading the jury by a preponderance of the evidence that she has met the four required elements.

185 Wn.2d at 848-49.

In the context of this case, the defendant, through questioning of the detective, was not positive how the firearm discharged, but acknowledged that one possibility was that it fired while in his hand when they had the argument/ altercation. RP 389:8-390:7. Whatever happened, it appeared to be in the context of the table being flipped, or his girlfriend throwing an object at him. RP 379:3-10.

Importantly, the detective acknowledged that he did not know for sure how the gun was discharged. The theory proposed by the state was based on the same evidence to the theory proposed by the defense, which was affirmatively established by the very same evidence. As noted in *Fisher*, it does not matter that the theory could have been inconsistent with some of his own testimony. *Id.* at 849.

Secondly, the state sought and received instructions on second degree murder based on intentional and felony murder. CP 105 (Court's Instruction No. 17). While manslaughter is not a lesser degree crime to the felony murder

charge, *See State v. Gamble,* 154 Wn.2d 457, 114 P.3d 646 (2005), the fact that the state acknowledged that the evidence may not be sufficient to demonstrate intentional murder conclusively demonstrates that the evidence presented would support a conviction of manslaughter as a lesser included to the charge of intentional murder, and the defense should have been given instructions to that effect.

B. THE DEFENSE WAS ENTITLED TO INSTRUCTIONS ON SELF DEFENSE.

The state maintains that the defense was not entitled to a self-defense instruction to felony murder when the murder is predicated upon assault with a deadly weapon. State's brief at 12. This is consistent with the state's argument at trial that "...the defense doesn't get a self instruction(sic) to the assault as the predicated felony of felony Murder." RP 594:1-9. In reliance on this argument the state cited to *State v. Slaughter,* 143 Wn.App.936, 186 P.3d 1084 (2008) and *State v. Callahan,* 87 Wn.App. 925, 943 P.2d 676 (1997). Additionally, in its response brief, the state alleges that *State v. Ferguson,* 131 Wn.App. 855, 129 P.3d 856 (2006) stands for the proposition that a defendant never receives a self defense instruction for felony murder when it is predicated upon assault in the second degree. State's brief at 12.

That is not the case. *Ferguson* addressed the request for a "deadly force" instruction. 131 Wn.App. at 862.The defense never requested an instruction based on deadly force or justifiable homicide. The requested instructions were based on the lawful use of force. CP 57-60. No cases have held that instructions based on lawful force would not be appropriate under these circumstances.

Indeed, the cases cited by the state at trial confirm the defense's entitlement to the instruction under the facts of this case. In *Slaughter*, the Court stated:

> Excusable homicide is available as a defense only where the slayer is `doing any lawful act by lawful means.' RCW 9A.16.030. In turn, RCW 9A.16.020(3) establishes that the use of force is lawful when the person is about to be injured, so long as the force used it not more than necessary. Thus, a defendant *could* argue that his action that precipitated the accidental killing amounted to lawful self-defense under RCW 9A.16.020(3), even if he could not argue that an accidental killing was a justifiable homicide under RCW 9A.16.050.
>
> In accordance with this reasoning, the trial court here instructed the jury on the use of lawful force by giving modified WPIC 17.02, which contains the self-defense language set forth in RCW 9A.16.020(3). The assault was the predicate to a homicide charge, and the issue raised by the defense was whether the homicide was an accident. The trial court gave the correct excusable homicide instruction and used the modified WPIC 17.02 to explain one of its terms. Unlike in *Callihan*, these instructions allowed Slaughter to argue his self-defense theory: that he was lawfully defending himself when he accidentally stabbed the victim. The self-defense instruction properly stated the State's burden to disprove the defense.

Slaughter at 945.

As such, the defense was entitled to the instruction as part of the instruction on excusable homicide, to explain that the situation here was merely an accident in the context of explaining that his actions were lawful, which is what the defense argued to the trial court. RP 598-99. Without the instruction, the defense was unable to put the argument in context and was prejudiced thereby.

III. CONCLUSION

Based on the files and records herein and the previous arguments submitted to this Court, the defendant requests that the Court grant his appeal and remand for a new trial in this matter.

RESPECTFULLY SUBMITTED this 22nd day of June, 2017.

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

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June 22, 2017 - 10:33 AM

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